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## News COURTS/LEGAL NEWS

### Immigration appeals swamp federal courts

By Claire Cooper -- Bee Legal Affairs Writer and Emily Bazar, Bee Staff Writer

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SAN FRANCISCO - Because of changes in the way the U.S. Department of Justice handles immigration cases, federal circuit courts are being buried under a 600 percent increase in deportation and asylum appeals, leading some judges to worry whether they can deliver justice.

The lion's share of the appeals - 47.6 percent last year - are landing in the 9th U.S. Circuit Court of Appeals, which includes the popular immigrant entry states of California and Arizona.

Chief 9th Circuit Judge Mary Schroeder of Phoenix said 872 immigration appeals were filed in her court in all of 2000, and 2,900 in the first six months of 2004.

"We are very concerned about the possibility that the quality of justice will be adversely affected in immigration cases because of the number," Schroeder said. She said she and her colleagues also fear other types of cases will suffer from the overload.

The crush came about because of a policy change two years ago at the Board of Immigration Appeals, the Justice Department branch that's a step below the circuit courts on the appellate ladder and a step above the 220 immigration

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judges working around the country.

Faced with a 56,000-case backlog, Attorney General John Ashcroft ordered streamlining of most BIA proceedings. He also reduced the BIA's membership from 23 judges to 11 - to improve cohesiveness, he said.

Ashcroft's reform expanded the use of expedited procedures adopted in 1999 to deal with the most cut-and-dried cases without convening three-member BIA panels or explaining decisions, as had been the norm.

Since September 2002, almost every appeal has been reviewed - and denied - within 90 days by one BIA judge. The immigrant receives only a form that says, "The board affirms without opinion the result of the decision below."

Streamlining has just about eliminated the BIA backlog. Previously, cases could languish for five years or more.

It has worked less well for the immigrants.

Rejection rates are up sharply - from 75 percent before the change to 90 percent after, according to a study sponsored by the American Bar Association.

BIA Chairman Lori Scialabba challenged those percentages in a letter to the ABA, saying they reflected an early push to dispose of the easiest cases.

But the Justice Department's Executive Office of Immigration Review told The Bee that compiling accurate figures would be impossible. The department also refused to comment on other issues raised in this report.

Rejected applicants, fearing persecution in their homelands or long separation from American families, or merely fabricating stories to gain months or years in the United States, are appealing to the circuit courts at increasing rates, hoping for better outcomes.

Some just want an explanation, said Lory Rosenberg, a former BIA judge who resigned rather than participate in reviews she considered perfunctory. They don't feel their cases have been appealed until they get more than a one-line answer, she said.

As Khandker Nazmul Hasan, of Hollywood, put it: "Without listening, (the BIA) just followed the last decision. We believe we didn't get justice. ... We decided to go to the higher court."

The 9th Circuit last month ordered the BIA to reconsider its decision that Hasan and his wife, a muckraking journalist in Bangladesh, could return safely to their homeland. They were subjected to assaults, arson and threats of violence there after his wife wrote articles criticizing a local politician.

One in every three new appeals to the 9th Circuit in the 2003 fiscal year was an immigration case.

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Nationally, appeals from BIA decisions accounted for about 2 percent of the circuit court workload in 2001, and about 15 percent by 2003, said Cornell University immigration law professor Stephen Yale-Loehr.

He compared streamlining to squeezing a balloon, saying, "The air just goes to a different part."

"It's a transference of costs from the executive branch to the courts," said Paul Rosenzweig, a senior fellow at the conservative Heritage Foundation. "Whose money do you want to spend if you're the executive officer - your own or the judges'?"

No separate statistics are kept on immigrants' wins and losses in the circuit courts. They're accounted for under a catchall category called "administrative appeals." In the 9th Circuit, that category consists almost entirely of immigration cases, said Cathy Catterson, the court clerk.

The latest figures, for the 12 months ending March 31, 2004, suggest that almost two-thirds of immigrants lost appeals outright at the 9th Circuit or had them dismissed for procedural reasons. Fewer than 4 percent won their cases outright. The rest of the cases were disposed of in various ways, often by sending them back to the immigration courts for new proceedings.

Overall, the numbers appeared somewhat better for immigrants in 2000-01. More than 6 percent won reversals then, and about 57 percent had appeals denied or dismissed.

Once a case gets past the BIA, the circuit courts have little leeway to reverse it because of numerous laws and legal precedents that limit their jurisdiction over immigration judges' decisions. Some immigration experts say the 9th Circuit is doing what it can to compensate for shortcomings in the immigration courts, but others say the circuit judges have been passing up legitimate appeals because of overwork.

"The (9th Circuit) is being inundated, and as any court, they're trying to deal with their docket and reduce it," said San Francisco immigration lawyer Mark Van der Hout. "So, unfortunately, what's happening is a lot of cases are being dismissed, some that should be dismissed on jurisdictional grounds and some that are questionable."

The results may depend, he said, on the political views of the three 9th Circuit judges chosen to hear the case, how they feel about communism or involuntary population controls, for example.

Even some of the judges are pointing to inconsistencies.

When one of the 9th Circuit's three-judge panels ruled in August that it was powerless to second-guess an immigration judge's decision against a Chinese immigrant, a dissenting judge pointed out that another panel had reached the opposite conclusion in May on a similar case. Both involved immigrants seeking asylum because of threats of forced sterilization in their homeland.

There's been little change in either caseloads or win-loss rates for immigration cases in the system's first level, before the 220 immigration judges. Since streamlining, however, critics say time pressures decrease the chances that an immigrant will prevail at the BIA: Cases there are allotted an average of five to 15 minutes, according to various estimates.

San Francisco lawyer Dominic Capeci said that speed is causing sloppiness, and cited the asylum case of Satish Kumar, his wife, Sarda, and their son, Sandeep - East Indians now living in Rohnert Park.

The family says Satish Kumar was attacked, and their home vandalized and burned in their native Fiji, where ethnic clashes between Fijians and the Indian minority are common.

In November, the BIA refused to consider an appeal from the family on grounds they hadn't included certain documents to support their claim. But Capeci provided The Bee with copies of the critical documents. Date stamps indicate the BIA received them Aug. 14, 2003.

The case is pending in the 9th Circuit, along with others in which immigrants are asking the circuit judges to make up for what they say is bungling, insensitivity or, at times, outright bias in the immigration courts.

Some 9th Circuit opinions support the contentions that there are deep problems.

In an Aug. 24 ruling involving a case the BIA had summarily rejected, the 9th Circuit found that an immigration judge's reasons for denying asylum to Samya Siraje Mohammed were "either factually or legally erroneous." It said the judge treated the Ethiopian asylum seeker with "incredulity and contempt."

Other circuit courts have been equally critical.

"There is very deep confusion here," the Chicago-based 7th Circuit said in April in reviewing an immigration judge's refusal to consider a persecution claim by members of Bulgaria's Macedonian minority on grounds that Bulgaria has a lawfully elected government.

"The Nuremberg Laws, which subjected Jews in Nazi Germany to persecution, were laws, but that doesn't mean that Jews were not persecuted," the opinion said.

As the circuit courts' backlog grows, suggested solutions are beginning to emerge. Bills in both houses of Congress would revamp the immigration courts and abolish such streamlining.

"In the absolutely necessary effort to plug up flaws in the system, we have taken any modicum of justice out of the immigration review process," said Rep. Howard Berman, D-Van Nuys, the House bill sponsor. He called the treatment of immigrants "unconscionable" and the burden on the circuit courts "stunning."

The Heritage Foundation's Rosenzweig, who said the immigration court system still invests "a great deal of resources in finding a relatively small number of meritorious claims," favors reforms that would remove most circuit judges from the process. He suggested creating a single immigration circuit court with nationwide jurisdiction, or returning to full-blown BIA hearings and eliminating appeals to the circuit courts altogether.

Meanwhile, Chief Judge Schroeder said she hopes for funds to institute efficiency measures, including hiring staff to sort the immigration appeals before they reach the three-judge panels - to group them by countries and issues, for example - "so that we don't have panels trying to reinvent the wheel."

The Justice Department in 2002 defended streamlining as a cure for a lumbering immigration system that allows ineligible immigrants to remain in the United States for years.

"The interest of the government in effective and efficient adjudication of immigration matters, moreover, is substantially higher than an individual respondent's interest in his or her own proceeding," said the statement published in the Federal Register a month before the policy went into effect.

The immigrant's interest may be in avoiding death, as in the Hasan proceeding.

In a less dramatic but perhaps more typical proceeding, Teresa Juarez's interest was this: The Culver City housekeeper and mother of two U.S.-born children received a deportation notice in 1995, 10 years after entering the United States illegally.

She applied for suspension of deportation to Guatemala on grounds of extreme hardship. The immigration court sent a hearing notice to her former address, though, and she was ordered deported in absentia. The BIA upheld the order without issuing an opinion.

"It affected me a lot ... figuring out what we would do if I had to leave the country, thinking about the kids, that they would have to leave school and go to a country that they're not familiar with," Juarez said in an interview.

The 9th Circuit ruled on her appeal in July. It noted that she had volunteered at Head Start and a food pantry and had led a children's program at her church. She attended literacy classes, worked steadily, paid taxes, received no public funds and committed no crimes.

It ordered the BIA to give her a chance to plead her case.

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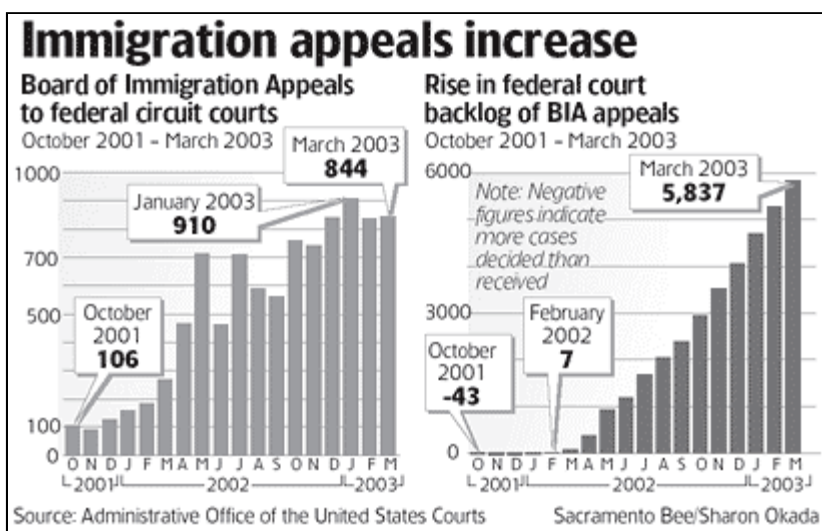
#### About the Writer

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